

Sunday, 27th September 2009

In defence of the bench

Kurt Sansone



"The principal task of a judge or a magistrate is not to justify himself with the general public but to administer justice in that particular case" - Chief Justice Vincent DeGaetano. Photo: Darrin Zammit Lupi

The seemingly lax use of suspended sentences by the judiciary has created a public outcry - but Chief Justice Vincent DeGaetano tells Kurt Sansone that few people bother to read entire judgments.

In July, when delivering a sentence on appeal, you queried whether the courts were applying the suspended sentence rule correctly. In that case the accused had been given no fewer than five suspended sentences for various unrelated crimes. Have things changed since then?

I am not prepared to discuss individual cases, whether they have been decided or not. However, I am sure there have been cases where the suspended sentence was not applied correctly.

The suspended sentence is one of the most useful tools in the arsenal that a judge or magistrate in the courts of criminal justice has. I am perhaps a bit partial, if I may be allowed to use that word, to the suspended sentence. When I was in the Attorney General's Office, I was involved, together with Silvio Camilleri, today the Attorney General, and the then Minister of Justice Guido de Marco, in the drafting of the bill which introduced it in our Criminal Code. We had the benefit of an excellent report and a draft bill prepared by Judge

Maurice Caruana Curran. In fact, he was really the architect of the current structure one finds in the Code.

Like every instrument, it may, in some cases, be misapplied. In the judgment you refer to, the Court of Criminal Appeal was querying in general terms, but that does not mean that judges and magistrates as a rule misapply the suspended sentence. In that particular case, the court simply stated that the facts did not warrant the application of a suspended sentence.

What do you mean when you say "misapplied"?

Misapplication would occur if a sentence is suspended when the law expressly says that it cannot be so; for instance, if the person sentenced is already serving a sentence of imprisonment, a fact which the sentencing court may have overlooked. Or else you may have a situation where the law does not exclude the application of a suspended sentence but, given the particular circumstances of the case, it should not have been applied.

There was a public outcry over the recently decided VAT fraud cases...

I will not discuss those in the slightest way. But you know perfectly well that periodically there are outcries about the length of sentences, the quantum of fines, sometimes that punishments are too harsh, sometimes that they are too lenient, the number of cases pending...

Beyond the particular cases, is public anger over the application of suspended sentences justified?

By and large I would say it is not justified. Unfortunately, many people do not bother to read the entire judgment. They rely on what was reported in the newspapers and the media. The media are very selective, most often reporting the more sensational things, and when they do they are often very concise without being precise. This may give a distorted picture of what happened in a particular case.

However, there are instances where two seemingly similar cases are handed down different sentences...

You are saying it: seemingly similar. They would not be similar. Are the two accused identical in background, criminal record, in their prospect of rehabilitation? Were the crimes executed in the same fashion? These factors, together with many others, are taken into consideration by the court in coming to a decision.

But why should there be the perception that if an accused appears before one judge he should expect a harsher sentence and a lighter one if he appears in front of another?

Judges and magistrates, like anywhere in the world, would probably have a reputation for either being harsh or lenient. But, generally, when going through all judgments given by that judge and all the judgments given by another judge ultimately, statistically, they level out...

But a reputation is not born out of thin air: it is based on their sentences.

And even more so on the way they are selectively reported. Out of the thousands of judgments delivered by magistrates every year, how many are actually reported by all the newspapers? Very few.

Some judges and magistrates have a reputation for being calmer in the way they conduct proceedings in court, others may have a reputation for being a bit more eccentric in their

behaviour during the court proceedings, but that is something you will find in every jurisdiction. Perhaps this is accentuated in Malta because we are a small community. Anyway, it would be terribly monotonous if we were all the same.

The perception that there is a wide discrepancy between one judge and another is totally wrong. There may be differences and sometimes judges and magistrates do err, but that is why there is the Court of Criminal Appeal.

Do you feel the courts are more inclined to come down harder on foreigners?

No, I do not believe that to be the case.

What about drug importation cases?

I believe this is a totally false perception. The fact is that the majority of drug importation cases involving large quantities of drugs concern foreigners who are engaged as couriers or, as I am now told the word used is, mules.

Should the judiciary be more forthcoming to explain their decisions to the public or are they aloof?

The principal task of a judge or a magistrate is not to justify himself with the general public but to administer justice in that particular case.

I recall a couple of years back when Sir Igor Judge, today the Lord Chief Justice of England and Wales, delivered a keynote speech at a Judicial Studies Committee event in Malta, he made the point that a judge in delivering a judgment should never have on his mind any of these questions: Will it satisfy the media? Will it please the government? What will my colleagues have to say about it?

These are questions that a judge should consciously stamp out from his mind. However, there may be some high profile cases where it may be appropriate for a judge or a magistrate to go into some more detail in spelling out the facts and in expounding the court's reasoning, but I would not go further than that.

Are you convinced members of the judiciary do not have Sir Igor's questions lingering in their mind when delivering judgment?

I have full confidence in all my colleagues on the bench until the contrary has been proved on this matter, and so far the contrary has not been proved.

Judge Lino Farrugia Sacco and Magistrate Antonio Mizzi have defied calls to abide by the judiciary's code of ethics. They still hold on to their respective posts in sports organisations. Have you taken any steps to redress this situation?

I am not prepared to discuss matters pertaining to the Commission for the Administration of Justice.

Are the judiciary above scrutiny, above the law?

Of course not.

A ministry working group on prison reform has suggested the introduction of parole. Do you agree?

I myself made submissions to the taskforce that drew up the recommendations. We have to see what the final product is going to be because there are various types of parole. Ultimately,

as a judge, I have to accept, apply and comply with the system that the legislature will adopt. My idea of parole is that it should substitute the one-third remission which currently applies to all prisoners.

Today, if a person has behaved himself in prison, his sentence is reduced by one-third. Remission is earned but once out of prison after benefitting from the reduction in sentence, he is not in any way in anyone's control.

Substituting remission with parole would mean that when a person becomes eligible for parole, for the remaining one-third of the sentence he would still be subject to being called back if he does not comply with certain conditions. This means that the prison sentence would be a full prison sentence and not a sentence reduced by one-third.

Parole is in principle a very sensible idea, but one must be very careful not to rush into introducing it simply because of possible overcrowding in prison. In that case parole would be introduced for the wrong reason.

In determining an injunction filed by the Marsa Sports Club to stop the letting off of fireworks from a ditch running through its premises, you sympathised with the club's argument that fireworks were causing disproportionate inconvenience to the public. You also commented that no law regulated noise pollution. Is it time for such a law to be introduced?

It is not up to the courts to decide when to introduce laws or not. It is up to our Parliament. I can only say that when I used to live in Msida and fireworks were let off from the area which is now Mater Dei Hospital, my house would actually tremble to the very foundations. All my cats would disappear into hiding. Fortunately, my children were not afraid of fireworks as I used to be when I was a child.

The choice of judges for the European Court of Human Rights...

I may be an interested party and so will not discuss the matter.

Are you interested in the post?

It is no secret that I applied the last time the call was issued, but whether I will apply again this time or not, I do not know. I haven't even seen the call for applications yet.

Government has been reprimanded for not putting forward at least one woman candidate. The issue has put a spotlight on gender inequality in the legal profession and the judiciary. Is it a question of not having competent enough women to fill the post or is it a cultural attitude that still discriminates against women?

This is a matter of public controversy, so I cannot really discuss it. It is a fact, however, that until very recently we had no women judges. The reasons may be many, but things are changing. More women lawyers are graduating. The majority of judicial assistants we have are women. One of the two magistrates to be appointed shortly, Gabriella Vella, was my judicial assistant.

Possibly because women tend to have certain other responsibilities within the context of the family, they may actually take a bit longer to make it to certain posts. But this is not only in the judiciary. The important thing is that things are changing.

There seems to be this glass ceiling across the board, this invisible hand that prevents women reaching the top...

I cannot see any invisible hand or glass ceiling.

How many women judges are there?

Under the Constitution of Malta, two; if you include Ena Cremona on the European Court of Justice, three.

Are you satisfied with this number?

Provided a person is competent and hard working, it matters not whether a judge is a man or a woman. I know, however, as a fact that when the minister approaches people, whether male or female, to be appointed to the bench, many simply refuse. They are very happy working as lawyers and do not want to assume the added responsibility of having to work as a magistrate or a judge. The conditions of service, moreover, are not all that attractive. The issue of pensions, for instance, is a hindrance to recruitment. The Executive has been sweeping the issue under the carpet now for far too long.

Maltese courts have the power to recognise a divorce obtained from a foreign jurisdiction but have no power to grant divorce themselves. Isn't this discriminatory?

I cannot answer the question because we simply apply the law as it is. However, the courts are not necessarily involved in the recognition of divorces obtained abroad.

Someone obtaining a divorce from abroad may simply apply to the director of public registry for that decision to be reflected on the marriage certificate which was originally drawn up here in Malta. The courts would normally be involved only if the director refuses to do so on the grounds that the legal requirements for that divorce to be recognised have not been satisfied.

However, whether it is discriminatory or not, I cannot express myself because one day it can present itself to me in a judicial capacity.

But is it anomalous?

It depends what you mean by anomalous. For example, under the Civil Code, Maltese courts may not award moral damages in an action in tort, but they will recognise and enforce, say, a corresponding English judgment which awards such moral damages.

The amendments to the marriage law in 1995 meant that if any of the partners started proceedings in the ecclesiastical tribunal, the civil proceedings had to stop. Does it irk you that the Church tribunal was put on the same level as the civil courts?

First of all that applies to marriages celebrated from a certain date onwards, and there are certain conditions and limitations. Second, that is a decision the legislator took and whether I am irked or thrilled is immaterial. I simply abide by the law.

Incidentally, last year the First Hall of the Civil Court in its constitutional jurisdiction ruled that the provision of law you are referring to, which provides that the civil proceedings are held in abeyance, does not infringe the right of fair hearing of the parties. The case was *Cassar v Deguara* and was decided in April of last year. No appeal was lodged to the Constitutional Court. So that is the position at law to date.

The judiciary is regulated by procedures that one would expect in a democracy: the right to a proper defence, an impartial hearing and so on. Can these rights be guaranteed in a Church tribunal?

Why not? This is why every annulment decision delivered by the ecclesiastical tribunal must be examined by the Court of Appeal before it can be registered and have effect for civil purposes.

We have to ensure that certain procedural requirements have been observed and, in particular, that the right of action and the right of defence have been guaranteed by the Ecclesiastical Tribunal in a manner not substantially dissimilar to the principles of the Constitution.

There have been instances where we refused to register a decision of the Ecclesiastical Tribunal. One particular case concerned a man who was married by the Catholic rites to a Tunisian woman. It was a marriage of convenience and the woman left. When the husband initiated proceedings before the Ecclesiastical Tribunal, the woman could not be traced. The tribunal simply declared her to be absent and continued to hear the case, granting the annulment. No curator was appointed to represent her, as is done in the civil courts, and the Court of Appeal held that the Ecclesiastical Tribunal could not proceed in this way and refused to recognise the annulment decision. The man had to file a civil case for annulment.

The procedures are different. In the Church tribunal, for instance, the judge assumes a more inquisitorial role and can dig up evidence the parties have not presented, something which we, in the civil courts, cannot do.